



## Legislative Bulletin.....November 15, 2001

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**H.R. 2269**—Retirement Security Advice Act

### Votes on the following bills were rolled to Thursday, November 15th:

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2. **H.Con.Res 239**— Expressing the sense of Congress that schools in the United States should set aside a sufficient period of time to allow children to pray for, or quietly reflect on behalf of, the Nation during this time of struggle against the forces of international terrorism
3. **H.R. 2887**—Best Pharmaceuticals for Children Act

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## **H.R. 2269—Retirement Security Advice Act (Boehner)**

**Order of Business:** The bill is scheduled to be considered on Thursday, November 15<sup>th</sup>, subject to a modified closed rule. Rep. George Miller (D-CA) may offer a Democrat amendment in the nature of a substitute (summarized below).

**Summary of the base text:** Effective January 1, 2002, H.R. 2269 would amend the Employee Retirement Income Security Act (ERISA) of 1974 and the Internal Revenue Code of 1986 to allow employers to provide workers with direct access to professional investment advice related to employees' choices of retirement investments, as long as the advisers disclose any fees or potential conflicts of interest. Currently under ERISA, employers may not provide retirement-plan participants with direct access to fiduciary advisers for individual investment advice.

Specifically, fiduciary adviser's counsel provided in connection with any sale, acquisition, or holding of a security or other property for purposes of retirement plan investment, as well as the fees for such advice, would be exempted from the list of prohibited transactions under ERISA.

H.R. 2269 would make the fees for such advice exempt from excise taxes imposed by section 4975 of the Internal Revenue Code.

The investment adviser, who would have to be officially registered with the appropriate authorities, would be required to provide clear, written notification in advance of any advice given of:

- the fees associated with the advice;
- any material or contractual interests the adviser may have in the securities or properties discussed
- any limitation placed on the scope of the advice
- the types of services provided by the adviser
- the adviser's role as a trustee of the applicable retirement plan

The investment adviser would be required to comply with all appropriate disclosure laws and provide advice that is at least as favorable as an arm's-length market transaction. Moreover, the adviser would be prohibited from actually making any investment without the express direction of the advisee and from charging unreasonable (undefined in bill) fees for the provision of advice.

Advisers would have to make their best-faith efforts to provide advice that is in the best financial interest of the individual plan-participant. As evidence of compliance, fiduciary advisers would be required to keep all records of such investment advice for at least six years.

Though employers would not be legally or financially responsible for any individual piece of investment advice given by fiduciary advisers, employers would remain responsible under ERISA fiduciary rules for the "prudent selection" and "periodic review" of any adviser and the overall advice given to employees.

**Cost to Taxpayers:** CBO and the Joint Committee on Taxation estimate that H.R. 2269 would have a negligible effect on federal spending and revenues.

**Does the Bill Create New Federal Programs or Rules?:** The bill would amend current law to allow employers to provide workers with direct access to professional investment advice related to employees' choices of retirement investments. In doing so, the bill would impose certain new disclosure requirements on fiduciary advisers who provide such advice.

**Constitutional Authority:** The Committee on Education and the Workforce (in House Report 107-262) cites constitutional authority in Article I, Section 8, Clause 3 (the power to regulate commerce). The Committee cites two cases, *Commercial Mortgage Insurance, Inc. v. Citizens National Bank of Dallas* and *Murphy v. WalMart Associates' Group Health Plan*, which both upheld the federal regulation of pensions and specific provisions of such regulation to be within the scope of congressional authority under Article I, Section 8, Clause 3.

**Summary of the Democrat Amendment in the Nature of a Substitute:** Under the Democrat amendment, employers could offer employees direct access to professional investment advice (and have fees for such advice be exempt from excise taxes) if the following requirements were met:

- Disclosure: When providing advice, the fiduciary adviser would be required to provide the employee with a clear and conspicuous disclosure notification in accordance with the following:
  - The disclosure could be written or provided by electronic means in a manner to be reasonably understood by the average plan participant.
  - The Secretary of Labor would be required to provide a model disclosure form pursuant to regulations, including the requirement that the form include mathematical examples easily understood by the average plan participant.
  - The adviser would be required to disclose any affiliation or contractual relationship of the adviser with any third party who has an interest in the security or other property.
  - The adviser also would be required to disclose all fees and other compensations (including ongoing fees and compensation) relating to the advice that the adviser (or any affiliate) is to receive in connection with providing advice, or in connection with the sale, acquisition, or holding of the security or other property.
- Alternative advice: If an adviser does have a connection to the security or property discussed in the investment advice, the adviser would be required to arrange for alternative advice by at least one other investment adviser under the same terms and conditions as the initial adviser (at no additional charge).
- Qualifications of individuals providing advice: In addition to the qualification requirements for a fiduciary adviser in the base bill, the Democrat amendment adds requirements for certain employees of certain investment entities whose duties include providing qualified investment advice. Such individuals would be required to be registered under the Investment Advisers Act or under state laws as provided in the base bill, be a registered broker or dealer under the Securities Exchange Act, or meet such other comparable standard as set forth by the Secretary.
- Liability: The Democrat amendment would explicitly provide for the personal liability of fiduciary advisers who have breached their fiduciary responsibilities outlined in this bill and enable plan participants to recover from the adviser in breach of duty any economic loss (plus attorney's fees) suffered as a result of such breach.
- Review by Secretary: The Secretary of Labor would be required to conduct annual reviews of randomly selected fiduciary advisers, focusing on disclosure compliance, the use of modern technologies, and the extent of complaints against the adviser.

All other provisions in the Democrat amendment are the same as those in the base bill.

**RSC Analysis of Democratic Amendment:** While the Democratic Substitute seeks to permit employers to provide retirement plan participants with access to financial advisors, the regulatory and legal barriers created by the Democratic Amendment would discourage employers from providing such access.

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**H.Con.Res. 228 —Expressing the sense of the Congress that the children who lost 1 or both parents or a guardian in the September 11, 2001, World Trade Center and Pentagon tragedies (including the aircraft crash in Somerset County, Pennsylvania) should be provided with all necessary assistance, services, and benefits and urging Federal, State or local agencies responsible for providing such assistance, services and benefits to move expeditiously in providing such assistance, services and benefits to those children (*Jackson-Lee*)**

**Order of Business:** While the resolution was considered under suspension of the rules on Tuesday, November 13, 2001, the voted will be taken on Thursday, November 15, 2001.

**Summary:** The Resolution expresses the sense of the House that:

- “Congress is grateful to the Federal, State, and local agencies for their actions to deliver prompt services to the children and families impacted by the events of September 11, 2001, and recognizes their efforts to expedite and streamline these important services, ”
- “the children who lost 1 or both parents or a guardian in the September 11, 2001, World Trade Center and Pentagon tragedies (including the aircraft crash in Somerset County, Pennsylvania) should be provided with such immediate assistance, services, and benefits for which they are eligible and which are necessary for their well-being, including— foster care assistance; adoption assistance; medical, nutritional, and psychological care; educational services; and such additional care or services as may be necessary”; and that
- “Congress urges each Federal, State, and local agency responsible for providing assistance, services, and benefits ...to— act without delay to provide such assistance, services, and benefits to children ...; and to the maximum extent possible, take such steps as are necessary to ensure that such assistance, services, and benefits are provided in the case of any such child within 60 days of the date of the determination of the death of the child’s parent, parents, or guardian.”

**Cost to Taxpayers:** None.

**Constitutional Authority:** A Committee Report citing Constitutional Authority is unavailable.

**Does the Bill Create New Federal Programs or Rules:** No.

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**H.Con.Res 239— Expressing the sense of Congress that schools in the United States should set aside a sufficient period of time to allow children to pray for, or quietly reflect on behalf of, the Nation during this time of struggle against the forces of international terrorism (Jones, Walter)**

**Order of Business:** While the resolution was considered under suspension of the rules on Tuesday, November 13, 2001, the voted will be taken on Thursday, November 15, 2001.

**Summary:** H.Con.Res 239 would express a sense of Congress that American schools should set aside a sufficient period of time to allow children to pray for, or quietly reflect on behalf of, the nation during this time of struggle against the forces of international terrorism.

**Additional Background:** President Bush has asked the American people to pray for those who suffered as a result of the attacks of September 11, 2001.

**Cost to Taxpayers:** The resolution authorizes no expenditure.

**Does the Bill Create New Federal Programs or Rules?:** No.

**Constitutional Authority:** A committee report citing constitutional authority is unavailable.

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**H.R. 2887—Best Pharmaceuticals for Children Act (Greenwood)**

**Order of Business:** While the bill was considered under suspension of the rules on Tuesday, November 13, 2001, the voted will be taken on Thursday, November 15, 2001.

**Summary:** H.R. 2887 would extend the FDA's expiring "pediatric exclusivity" provisions through October 1, 2007. ["Pediatric exclusivity" refers to a six-month period during which the FDA will not permit another manufacturer to market a generic version of a drug. Such exclusivity is granted in exchange for the manufacturer conducting studies, requested by the FDA, of the effect of drugs when taken by children.]

H.R. 2887 would direct the Secretary of Health and Human Services, through the National Institutes of Health, to develop an annual list of approved drugs for which there is an approved or pending new drug application or no patent or market-exclusivity protection, and for which additional pediatric safety and effectiveness studies are needed. The bill would direct the Secretary to award contracts to entities with appropriate experience for pediatric clinical trials of such drugs and would establish an FDA contract process for related labeling changes.

Additionally, the bill would:

- eliminate the user fee waiver for pediatric supplements to a human drug application;

- provide priority status for pediatric supplements;
- include neonates within the definition of pediatric studies;
- provide for dissemination of pediatric supplement information; and
- set forth requirements for the additional six-month exclusivity period for new or already-marketed pediatric drugs.

The HHS Secretary would be directed to establish an Office of Pediatric Therapeutics within the Office of the Commissioner of Food and Drugs, which shall coordinate all FDA pediatric activities, and to establish the non-profit Foundation for Pediatric Research to support research on drugs lacking exclusivity for which pediatric studies are needed. The bill would further authorize several studies related to the pediatric exclusivity program and pediatric research.

The Secretary would be required to contract with the Institute of Medicine to review federal regulations, reports, and support for research involving children, with particular attention to issues of compensation, informed consent, and risk/ benefits assessments in terms of research versus therapeutic treatment.

#### **Cost to Taxpayers :**

- CBO estimates that H.R. 2887 would authorize appropriations costing taxpayers \$217 million in FY2002 and \$827 million over the FY2002-FY2006 period.
- CBO estimates that the bill would have a net effect of reducing mandatory spending, saving taxpayers \$2 million in FY2002 and \$6 million over the FY2002-FY2006 period.
- Additionally, CBO estimates that the bill would increase federal revenues by \$6 million in FY2002 and by \$33 million over the FY2002-FY2006 period. Many of the changes to mandatory spending and revenues are a function of changes in drug prices as a result of this bill.

The Commerce Committee disputes the CBO cost estimate for potential discretionary costs. CBO assumes that 150 drugs lacking market exclusivity or patent protection, and certain biologics, would be studied under new provisions in the bill. The committee, however, believes this estimate is too high and points to the American Academy of Pediatrics which estimates that between 30-50 drugs will need study under the fund. If the Committee is correct, the discretionary cost of the bill over five years would be reduced by \$440 million to \$387 million.

**Does the Bill Create New Federal Programs or Rules?:** Though the primary function of the bill is to extend current law that is expiring, the bill would also create new grants, an office within the FDA Commissioner's Office, and a non-profit foundation.

**Constitutional Authority:** At press time, House Report 107-277 was unavailable.

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